

NTSB Order No. EA-3973

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 23rd day of August, 1993

Respondent .

Docket SE-13171

## 6148

the FAA of his qualifications to hold a DC-3 type rating.<sup>2</sup>

The evidence establishes that respondent is the chief pilot for a parachute jump business. On April 20, 1993, he operated civil aircraft N8056, a Douglas DC-3, for the purpose of releasing parachute jumpers. On takeoff, after the aircraft had reached an altitude of approximately 300 feet, respondent noticed a burning odor and observed that the left engine fire warning light had illuminated. Respondent followed the in-flight fire emergency checklist and determined that the left engine should be shut down. After shutting down the engine, he testified that he "pulled the mixture and punched the feathering button to feather the propeller."<sup>3</sup> The aircraft began to decelerate and would not climb on one engine. Respondent was forced to make an emergency landing in an open field. None of the occupants were injured during the landing but the aircraft sustained major damage.

As a result of an investigation which included a review of the logbooks and performance data, Inspector Benjamin Harris of the Federal Aviation Administration (FAA) determined that the aircraft should have been able to climb on one engine at a rate of 310 feet per minute. He therefore concluded that the reason the aircraft was unable to climb was "possibly related to (but not limited to) one or more of the following:

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<sup>2</sup>Section 609(a) of the Federal Aviation Act of 1958, as amended, provides that "The Administrator may, from time to time...reexamine any civil airman."

<sup>3</sup>The Administrator's witnesses agree that these procedures were proper.

- Crewmember lack of competency
- Inadequate power available from the remaining right engine
- Incorrect engine or aircraft performance indication."

(Inspector's Statement, Administrator's Exhibit A-2). Inspector Harris decided to request a reexamination of respondent's competency to hold a DC-3 type rating. He issued a letter to respondent which states, in pertinent part as follows:

Investigation of the accident which occurred in the vicinity of Zephyrills, Florida, on April 20, 1993, gives reason to believe that a reexamination of your airman competency to hold a DC-3 type rating at the Commercial Pilot level, is necessary in the interest of safety.

Therefore, pursuant to the authority contained in Section 609 of the Federal Aviation Act of 1958, as amended, you are requested to appear at or contact the North Florida Flight Standards District Office (FSDO)...to arrange for that reexamination. The reexamination will consist of Areas of Operation and Tasks selected from FAA-S-8081-2, Commercial Pilot Practical Test Standards and FAA-S-8081-5, Airline Transport Pilot and Type Rating Practical Test Standards, with emphasis on takeoffs, landings, and emergency procedures. The reexamination must be conducted in a Douglas DC-3 airplane.

Inspector Ronald P. Morgan of this Flight Standards district office has been assigned to conduct this reexamination.

Respondent apparently had difficulty in arranging for a DC-3 aircraft in the Orlando area, so he had his attorney call Inspector Harris. As a result of their discussion, respondent was granted a 10-day extension of time and he was given permission to go outside of the jurisdiction of the Orlando FSDO, in order to accomplish the reexamination.

On May 27, 1993, FAA-designated pilot examiner Ronnie Gardner administered to respondent a proficiency check in a DC-3

aircraft. According to Mr. Gardner's statement (Exhibit R-4), his evaluation was conducted in accordance with FAR Section 61.58, and he found respondent to be qualified to hold a DC-3 type rating.<sup>4</sup> Respondent subsequently advised the Orlando FSDO of the results of this proficiency check, and he was advised that it would not satisfy the requirements for a Section 609 reexamination which could only be administered by an FAA examiner. This emergency suspension action ensued.

The law judge determined that there was a reasonable basis for the Administrator's request for reexamination, and that respondent failed to comply with that request. He therefore affirmed the Administrator's emergency order suspending respondent's DC-3 type rating. Respondent filed a timely notice of appeal of that order, and perfected that appeal by filing an appeal brief.

Respondent raises three issues on appeal. First, he argues that the FAA failed to establish that there was a reasonable basis for ordering a reexamination of his competency. Respondent suggests that, had the investigation into the accident been more thorough, the inspector would have found that the propellers were nonconforming and the ailerons drooped. He argues that had the inspector determined that one or both of those factors caused the aircraft to be unable to climb on one engine, it would not have been reasonable for him to also question respondent's competency

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<sup>4</sup>There is no evidence that Mr. Gardner purported to give respondent a Section 609 reexamination.

as a pilot. Respondent also contends that the Administrator must accept the results of his type rating check in satisfaction of the 609 reexamination request, which establishes his competency to operate a DC-3 aircraft. Finally, respondent argues that the reexamination request is invalid because it was made by an inspector, and there is no evidence that the Administrator has delegated his authority under Section 609 to FAA inspectors to request reexamination. The Administrator has filed a brief in reply, urging the Board to affirm the initial decision and the emergency suspension order.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's emergency order. For the reasons that follow, we deny respondent's appeal.

The law judge's initial decision is extensive in its factual findings and legal analysis. Stated succinctly, we agree with the law judge that there is no merit to any of respondent's contentions. Accordingly, we adopt the law judge's findings as our own.

As we recently noted in Administrator v. Carson and Richter, NTSB Order No. EA-3905 at 4 (1993), Board precedent is clear that to prevail on an order suspending an airman certificate or rating pending successful reexamination, the Administrator need only show that a reasonable basis exists for questioning the certificate holder's competence. In Administrator v. Ringer, 3

NTSB 3948 (1981), the Board set forth the standard of review to be applied to those cases which question the reasonableness of the Administrator's exercise of his authority to request reexamination of an airman. We noted that, objectively viewed, the Administrator's request must be reasonable. Id. at 3949. We explained that,

[t]his does not mean that the law judge or the Board may invalidate a reexamination request simply because some factor, or factors, other than pilot competence may have been responsible, in whole or in part, for the incident or accident underlying it. It means only that the Administrator, to have his request upheld, must demonstrate a reasonable basis for believing that pilot competence could have been a factor. Where such a basis has been shown, it is of no legal significance that the airman involved may differ with the Administrator's judgment as to the necessity for a reexamination.

Id. See also, Administrator v. Norris, NTSB Order No. EA-3687 (1992), and cases cited therein.

In our view, the argument that before a reasonable request for reexamination could be made of respondent, the investigator had to order a tear-down of the aircraft and determine the exact cause of the aircraft's inability to climb, is devoid of merit.<sup>5</sup>

The inspector was not required to exclude every possible cause

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<sup>5</sup>The Board finds respondent's argument concerning the inspector's authority to request reexamination unpersuasive. Inspector Harris testified that the Administrator has delegated the authority to request reexamination under Section 609 to his inspectors. While the delegation has not been established with documentary evidence, certainly the inspector had at least the apparent authority to request reexamination. See e.g., Administrator v. O'Day, 4 NTSB 1118, 1120 (1983). In any event, that request was ratified by the issuance of the suspension order by an Assistant Chief Counsel, in accordance with his delegated authority under 14 C.F.R. § 13.19(b).

of the accident other than pilot competency before making the request. To hold otherwise would be contrary to the public's interest in air safety. Based on the facts Inspector Harris had available to him at the time he made the request, we are convinced that it was reasonable for him to believe that respondent's competence may have been a factor in the cause of the accident.<sup>6</sup>

Turning to respondent's claim concerning his proficiency check, we think little comment is warranted. The law judge found, as a matter of credibility, that FAA-designated examiner Gardner had not been advised by respondent before the proficiency check that respondent had been requested to undergo a Section 609 reexamination, nor did Gardner know that this request was a result of a recent incident. Respondent admitted on the stand that he did not directly tell Mr. Gardner about the Section 609 request, but he was certain Gardner had heard elsewhere about the incident. The law judge found that respondent, who was due to take an annual proficiency check at the time of his check with Mr. Gardner, "intentionally attempted to avoid compliance with the FAA request for reexamination by seeking an unauthorized

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<sup>6</sup>Nor are we convinced now that a mechanical cause was the likely cause of the accident. Respondent's evidence concerning the fact that the propeller tips had been squared off to improve performance of the aircraft, and his argument that this condition "may" have caused the aircraft's inability to climb, is hardly conclusive. As the Administrator asserts in his reply brief, the fact that the aircraft climbed normally with both engines, and that respondent had never before experienced a problem with this aircraft, which he had previously operated for more than 100 hours, is not supportive of respondent's claims of causation.

alternative means done without the FAA's knowledge." (Initial Decision at 487). The law judge further concluded that "the means he [respondent] chose was not the equivalent of having the reexamination performed by an FAA Inspector." Id. Respondent has offered us no persuasive reason to disturb the law judge's credibility findings. We will not overturn credibility determinations of a law judge absent evidence that his findings are arbitrary or capricious or based on inherently incredible evidence. Administrator v. Pullaro, NTSB Order No. EA-3495 at 3 (1992), and cases cited therein.

In any event, respondent neither asserts, nor does the examiner who performed the proficiency check claim, that respondent was administered a Section 609 reexamination by an FAA inspector, as respondent was requested to do in the letter he received from Inspector Harris. Respondent's argument is premised on his belief that a proficiency check by an examiner is a satisfactory substitute. However, according to the testimony of Inspector Harris and Inspector Morgan, it is clear that the reexamination they intended respondent to undergo would have concentrated on respondent's ability to perform emergency procedures in the event of an engine failure. It is also clear from their testimony that they would have emphasized these maneuvers because of their concerns with respondent's competency in light of the accident on April 20, 1993. As we found in Administrator v. O'Day, 4 NTSB 1118 (1983), and as has been amply established in this record, there are fundamental differences in



the scope and breadth of a Section 609 reexamination and a FAR section 61.58 proficiency check. Moreover, an airman may not dictate to the Administrator how questions concerning his competency are to be resolved. By statute, the Administrator [or his delegate] is alone empowered to make such a determination, when it is reasonable to do so. The record before us establishes the reasonableness of the Administrator's request for reexamination here.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The Administrator's emergency order suspending respondent's DC-3 rating, and the initial decision, are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.